

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 06.12.2016

+ **EX.P. 51/2009**

SUNNAREN SEAWAYS INC.

..... Decree Holder

versus

MSTC LIMITED

..... Judgement Debtor

Advocates who appeared in this case:

For the Decree Holder : Mr N. Ganpathy, Senior Advocate with Mr Atul N. and Mr Pradhyuman Sharma.

For the Judgment Debtor : Mr Rakesh Tikku, Senior Advocate, Mr R.K. Panigrahi and Mr Sandeep Kumar.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. M/s Sunnaren Seaways Inc. (hereafter 'SSI') has filed the present petition to enforce the arbitral award dated 15.04.1995 (hereafter 'the award') published by the Umpire (Capt. S.M. Berry) which was made a Rule of Court by an order passed by the Single Judge of this Court on 20.09.2006.

2. SSI is the owner of the vessel – M.V. Progressive - which was given by SSI on Charter to the respondent (hereafter 'MSTC'). MSTC had chartered the said vessel to import 17000 mt (+ - 5% at owners option) of pig iron in bulk from the Port of Novorossisk, Russia. The parties had entered into a Voyage Charter Party Agreement dated 14.12.1989 (hereafter 'Charter Party') and in terms of clause 47 of the Charter Party, all

disputes under the Charter Party were to be settled in India in accordance with the provisions of the Arbitration Act, 1940.

3. Certain disputes arose between the parties in relation to the said Charter Party which were referred to arbitrators. Each party appointed their own arbitrator and the said arbitrators appointed an Umpire. There was a difference of opinion between the two arbitrators appointed by the parties and consequently, a reference was made to the Umpire who delivered the award on 15.04.1995.

4. In terms of the award, a sum of US \$ 49,536.09 (US \$ Forty Nine Thousand Five Hundred Thirty Six and Nine cents only) was awarded in favour of SSI. In addition, the Umpire also awarded interest at the rate of 12% per annum from 07.07.1990 till the date of payment.

5. MSTC has not filed any separate objections to the present execution petition, however, certain objections were indicated by MSTC in an application(E.A No. 538/2012) filed for modification of the order dated 20.04.2012 as also in an affidavit filed on 30.01.2013. By an order dated 18.10.2016, both the parties were also granted opportunity to file a written note of their submissions. Although written submissions were filed by Mr N. Ganpathy, the learned counsel appearing for SSI, none were filed on behalf of MSTC.

Submissions

6. Mr Rakesh Tikku, learned Senior Counsel appearing for MSTC, opposed the present petition by advancing contentions on, broadly, five fronts.

6.1 First, that SSI was dissolved on 07.03.1994 (which is prior to the date of publication of the award) and, therefore, was not in existence at the time of filing of the execution. Mr Tiku submitted that in the circumstances, the present petition was incompetent, and therefore ought to be dismissed. He contended that as per the Charter Party in question, Indian law was applicable and therefore whether SSI (a dissolved company) could maintain a petition would have to be considered in the context of the Companies Act, 1956 (or Companies Act, 2013) and not as per the Liberian law.

6.2 Secondly, he submitted that even if it is assumed that SSI could maintain proceedings that were pending on the date of dissolution and further institute proceedings within a period of three years thereafter, the present petition, filed on 20.12.2008, was much beyond the period of three years from the date of dissolution of SSI. He further submitted that execution proceedings are different from the arbitral proceedings and/or the proceedings for making the award the Rule of Court. Therefore, the present execution proceedings could not be considered as an extension of arbitral proceedings, which had commenced prior to dissolution of the company, SSI.

6.3 Thirdly, he stated that the present petition was incompetent as it had been instituted by Mr Ruben A. Fernandes on the basis of a Power of Attorney executed on behalf of SSI by one Mr Antonios Theodore Giavridis and according to Mr Tiku, Antonios Theodore Giavridis had no authority to execute the power of attorney on behalf of SSI.

6.4 Fourthly, Mr Tiku contended that although SSI may have been revived subsequently, however, the same would be of no relevance as on the date of filing of the present petition, SSI was not in existence.

6.5 Lastly, Mr Tiku submitted that since there was a serious dispute as to the existence of SSI as well as the authority of the constituted attorney to institute the present proceedings, the said issues were required to be adjudicated after a full fledged trial.

7. Mr S. Ganpathy, the learned Senior Counsel appearing on behalf of SSI countered the submissions made on behalf of Mr Tiku. He pointed out that SSI was a company incorporated under the Liberian Law and under the Liberian Corporate Law, corporations were entitled to maintain proceedings even after the date of dissolution. He also referred to Section 11.4.1 & 11.4.2 of the relevant statute as also the legal opinions of legal experts conversant with Liberian Law in support of his contention that the present petition was maintainable. He further submitted that articles of dissolution of SSI had been rescinded and he relied upon the Proclamation of Rescission of Dissolution issued by the Ministry of Foreign Affairs of the Republic of Liberia certifying that SSI stood restored to full existence with retroactive effect from 07.03.1994.

Reasons and Conclusion

8. Before proceeding further, it would be relevant to notice as to the manner in which the objections were raised by MSTC and SSI's response thereto.

9. The award published by the umpire was made the Rule of the Court on 20.09.2006 and, thereafter, SSI had filed the present petition on

20.12.2008. During the pendency of the present petition, MSTC filed an application (EA No.538/2012) wherein it, *inter alia*, stated that upon enquiry made with the Liberian Corporate Registry, it had become aware that SSI had been dissolved. This fact was also brought to the notice of this Court on 28.05.2012 and the hearing of the petition was deferred to 03.08.2012. Prior to that date, Mr Ruben A. Fernandes (the Power of Attorney holder of SSI) had filed an affidavit, *inter alia*, affirming that under the Liberian Company Law, a company that is dissolved would be deemed to be in existence until all amounts due to it under the decrees/awards passed in its favour are recovered. The said affidavit also enclosed extracts of the Liberian Company Code (Section 11.4.1 and 11.4.2).

10. At the hearing held on 03.08.2012, MSTC raised certain objections as to the authority of Mr Ruben A. Fernandes to prosecute the present petition on behalf of SSI. This Court, on 03.08.2012, directed that the original document appointing Mr Ruben A. Fernandes be produced in the Court and the matter was deferred to 10.10.2012. On that date - that is, 10.10.2012 - the original Power of Attorney in favour of Mr Ruben A. Fernandes was produced in the Court and was duly examined. In response to the affidavit filed on behalf of SSI, MSTC also filed an affidavit, *inter alia*, raising various objections; the principal objection being that the Power of Attorney in favour of Mr Ruben A. Fernandes was executed on 07.09.1995 which was after SSI had been dissolved. MSTC further urged that the laws of Liberia had no application since the Charter Party was governed by the Indian Law.

11. The aforesaid contentions were countered by SSI by filing an affidavit affirmed on 07.02.2013. SSI also filed an affidavit of Mr Ioannis Th. Giavridis who was a Director of SSI at the material time affirming that Mr Antonios Th. Giavridis was the Director and the President of SSI at the time of dissolution of SSI and had full authority to execute the Power of Attorney on behalf of SSI. Thereafter, Mr Fernandes also filed another affidavit producing the minutes of the joint meeting of the Board of Directors and Shareholders of SSI held on 10.05.1993, which empowered Mr Antonios Th. Giavridis to act on behalf of SSI.

12. On 22.08.2013, this Court directed that the aspect whether the Liberian company could be deemed to be in existence for the purposes of recovery of amounts would have to be established by SSI by way of an affidavit of a person well conversant with the Liberian Law. In compliance of the said observations, SSI filed an affidavit of Mr Charles Walker Brumskine affirming that SSI would be deemed to be in existence until the Award is fully executed. The aforesaid affidavit was sought to be countered by MSTC and MSTC also produced an opinion of a firm of legal practitioners situated in Monrovia, Liberia.

13. Mr Fernandes filed further affidavit on 05.08.2014, *inter alia*, affirming that the Articles of Dissolution was rescinded and SSI was revived retroactively from 07.03.1994. He further stated in the affidavit that since SSI was revived with effect from 07.03.1994, MSTC's objections that SSI stood dissolved, no longer survived.

14. SSI has produced the minutes of the meeting of the Board of Directors and Shareholders of SSI held on 10.05.1993. On the said date, SSI passed a resolution for its dissolution, *inter alia*, authorizing the

President and Director of SSI, Mr Antonios Th. Giavridis and the Secretary, Treasurer, Director, Mr Ioannis Th. Giavridis to severally act on behalf of SSI to carry out all legal actions for collection of all and any outstanding and receivables, due to SSI from the said date and “after the dissolution of the corporation”. A plain reading of the aforesaid resolution clearly indicates that Mr Antonios Th. Giavridis was individually empowered to take the necessary action on behalf of SSI for recovery of the dues of SSI.

15. Mr Antonios Th. Giavridis executed the Power of Attorney on behalf of SSI and authorized Capt. D. F. Marker and Mr Fernandes to undertake all actions jointly or severally in connection with the disputes between SSI and MSTC concerning the vessel M. V. PROGRESSIVE and Charter Party Agreement dated 14.12.1989.

16. The original Power of Attorney was produced before the Court and there is no dispute that in terms of the Power of Attorney, Mr Fernandes is duly authorized to act on behalf of SSI. The only contention canvassed by Mr Tiku in this regard was related to the authority of Mr Antonios Th. Giavridis to execute the Power of Attorney on behalf of SSI. He strongly relied on the legal opinion obtained by MSTC from a firm of legal practitioners in Liberia. He referred to the said opinion and submitted that after dissolution of SSI, the Directors of the company acted as a Trustee and no single Trustee was authorized to take action on behalf of the company and only the Board could take actions in the interests of the dissolved company.

17. I am not persuaded to accept the aforesaid contention mainly for the reason that the resolution passed by the Shareholders and the Directors of

SSI clearly empowered both Mr Ioannis Th. Giavridis and Antonios Th. Giavridis to act severally for the company (SSI) after its dissolution. More importantly, Ioannis Th. Giavridis has filed an affidavit duly affirming that the Power of Attorney executed on behalf of SSI in favour of Mr Fernandes was validly issued and he has also ratified - on solemn affirmation - all acts taken by Mr Fernandes for and on behalf of SSI. Thus, both the Directors of SSI (Mr Antonios Th. Giavridis and Mr Ioannis Th. Giavridis) have confirmed that the authority conferred on Mr Fernandes was valid. The acts of Mr Fernandes in instituting and prosecuting the present petition are thus fully confirmed as valid by the Directors of SSI (which according to MSTC constitute the Board of Trustees of SSI after the dissolution of the said company).

18. The next aspect that requires to be considered is whether SSI could maintain the present petition in view of the fact that it stood dissolved on 07.03.1994. In my view, the said question has now become academic in view of the subsequent development whereby SSI had been revived and restored to full existence. The affidavit affirmed by Mr Ruben A. Fernandes on 05.08.2014 indicates that under the Liberian Code of Laws, the corporation may rescind its articles of dissolution by adoption of a resolution of the Board of Directors and resolution adopted by its shareholders by 2/3rd majority. SSI has placed on record the “Proclamation of Rescission of Dissolution” duly signed by the Minister of Foreign Affairs of the Republic of Liberia restoring the full existence of SSI as a company. The said proclamation reads as under:-

**“PROCLAMATIOI OF RESCISSION OF
DISSOLUTION**

OF
SUNNAREN SEAWAYS INC.

REGISTRATION NUMBER: C-31157

In accordance with the Associations Law, Title 5, as amended, of the Liberian Code of Laws Revised,

I, Boakai Kanneh

by the authority of the Minister of Foreign Affairs of the Republic of Liberia, do proclaim with retroactive effect to 7th day of March, 1994 that

SUNNAREN SEAWAYS INC.

REGISTRATION NUMBER: C-31157

which was dissolved on 7th day of March, 1994 by action of the filing with the Minister of Foreign Affairs of Articles of Dissolution of the Articles of Incorporation, such Articles of Dissolution having been filed in error, and Articles of Rescission of Dissolution having been filed this day, is hereby restored to full existence with any and all rights, privileges and immunities and subject to any all duties, debts and liabilities which had been or may be enjoyed by or imposed on the Corporation.

IN WITNESS WHEREOF, I have set my hand

and caused the Seal of the Ministry of Foreign

Affairs to be affixed this 15th day of July, 2014.

By order of the Minister of Foreign Affairs, R.L."

19. The aforesaid proclamation has also been duly apostilled. The said notification is not disputed by MSTC and the only contention advanced by

Mr Tiku in this regard is that subsequent restoration of SSI does not validate the act of instituting the present petition because at that time, SSI was not in existence. In my view, the aforesaid contention is also inconsiderable; first of all for the reason that the company stood restored with effect from 07.03.1994 because as per the above proclamation, the Articles of Dissolution stood rescinded. If dissolution of SSI is annulled/rescinded, the result is that SSI was never dissolved. This is so because the act of dissolution is itself nullified. Secondly, even if Mr Tiku's contention is accepted - although this Court does not - the only effect is that SSI would have to reinstitute the present petition and, therefore, Mr Tiku's objection would, at best, only result in prolonging the proceedings.

20. In view of the above, it is not necessary to examine the contention whether SSI could maintain the present petition even after its dissolution, however since the counsel have made submissions on that aspect also, I consider it appropriate to consider the same.

21. Before proceeding further, it is relevant to refer to the relevant provisions of the Liberian Company Code which are extracted below:-

"11.4. Winding up affairs of corporation after dissolution.

1. *Continuation of corporation for winding up.* All corporations, whether they expire by their own limitations or are otherwise dissolved, shall nevertheless be continued for the term of three years from such expiration or dissolution as bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, to discharge their liabilities, and to

distribute to the shareholders any remaining assets, but not for the purpose of continuing the business for which the corporation was organized. With respect to any action, suit, or proceeding begun by or against the corporation either prior to or within three years after the date of its expiration or dissolution, and not concluded within such period, the corporation shall be continued as a body corporate beyond that period for the purpose of concluding such action, suit or proceeding and until any judgment order, or decree therein shall be fully executed.

2. *Trustees.* Upon the dissolution of any corporation, or upon the expiration of the period of its corporate existence, the directors shall be trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property, real and personal, as may be required by the laws of the country where situated, prosecute and defend all such suits as may be necessary or proper for the purposes aforesaid, distribute the money and other property among the shareholders after paying or adequately providing for payment of its liabilities and obligations, and do all other acts which might be done by the corporation, before dissolution, that may be necessary for the final settlement of the unfinished business of the corporation."

22. A plain reading of the aforesaid provision clearly indicates that notwithstanding dissolution of a Liberian company, it can nonetheless institute and maintain proceedings to settle their business within a period of three years after the dissolution. Further, by legal fiction, the existence of a Liberian company would continue to exist beyond the specified period for the purpose of concluding such action, suit or proceeding and until any judgment, order or decree shall be fully executed.

23. Mr Tiku had contended that execution proceedings are separate from the arbitral proceedings and, therefore, even though SSI could institute proceedings for making the Award the Rule of Court, it could not institute the present execution proceedings. In my view, the said contention cannot be accepted as it would militate against the very purpose for which existence of a dissolved company is fictionally extended. Further, the words "such action, suit or proceedings and until any judgment, order or decree" would clearly cover within its ambit, the entire proceedings for recovery which would not only include proceedings making an award the Rule of Court but also for enforcing the said Award.

24. SSI had filed an affidavit of a legal expert, Mr Charles Walker Brumskine confirming that SSI could maintain the present proceedings. Credentials of Mr Charles Walker Brumskine clearly establish him to be a legal expert and there is no reason to not accept it. The relevant extract of the said opinion is as under:

"4. I state that in view of the aforesaid provision of the Statute, given that the Decree Holder corporation was incorporated under Liberian law and given that the documents reviewed indicate that the arbitration and subsequent proceedings in question were instituted prior to or within three years after the date of its dissolution, as far as the Liberian law is concerned, the Decree Holder corporation will be deemed to be in existence as a body corporate until such time as the "...judgment, order, or decree therein..." has been "fully executed". In other words in my opinion, since the award/decreed is not fully executed, under Liberian law the Decree Holder corporation will be deemed to remain in existence until such time as the award/decreed is fully executed."

25. The opinion of a legal expert, Mr. Emmanuel B. James, LL.M Counsellor-At-Law, furnished by MSTC is also not in variance with the aforesaid view as is apparent from the extracts reproduced below:

"We should emphasize also that under the Associations Law, referenced hereinabove, a company registered under Liberian Law is vested with the right to commence and maintain legal proceedings, both in Liberia and in any other country where the corporation is doing business, as allowed by the laws of such other countries, during the corporate existence prior to and after dissolution during and within the three years winding up period; and, where the suits last for any period beyond the three year period, the company is given such further period as may be required to maintain and conclude such legal proceedings, whether the suit is within Liberia or another jurisdiction. Thus, under the facts which you have communicated to us in the instant situation, we are of the opinion that the company involved can maintain legal proceedings during the period specified herein after its dissolution, both in Liberia and in the countries in which it was operating or doing business, provided that such actions are not barred or prohibited in such foreign countries. Where the latter obtains, i.e. where the laws of the foreign country bar or prohibit the action, the laws of such foreign country prevail and the Liberian corporation is under a legal obligation to comply with or conform to the laws of such foreign country".

26. Lastly, Mr Tiku had submitted that in view of the contentious issues, a full fledged trial must be conducted to determine whether the present petition could be maintained by SSI. However, I am not persuaded to accept the same since there is no diversion of opinion between the legal opinion furnished by SSI and MSTC as indicated above.

27. The learned counsel for the parties had also confirmed that MSTC had deposited the entire awarded amount with the Registry of this Court. In the circumstances, the present petition is disposed of by directing the release of the money deposited by MSTC in favour of SSI. The Registry is directed to release the amount deposited by MSTC to the authorized representative of SSI subject to regulatory approvals, if any.

28. In view of the above, the petition is disposed of. No order as to costs.

DECEMBER 06, 2016
pkv/MK/RK

VIBHU BAKHRU, J

